No. 82-1284

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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CENTRAL FLORIDA ENTERPRISES, INC., PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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## QUESTION PRESENTED

Whether in a comparative licensing renewal proceeding the Federal Communications Commission properly concluded that the benefits of renewing the television license of the incumbent broadcaster, whose previous record was meritorious, outweighed other factors that favored the competing applicant.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-16) is reported at 683 F.2d 503. The decision of the Federal Communications Commission (Pet. App. A-17 to A-108) is reported at 86 FCC 2d 993. A prior decision of the court of appeals in this case (Pet. App. A-269 to A-308) is reported at 598 F.2d 37.

### JURISDICTION

The judgment of the court of appeals was entered on July 13, 1982. An order denying rehearing was entered on October 15, 1982 (Pet. App. A-16). On January 6, 1983, the Chief Justice extended the time

within which to file a petition for a writ of certiorari to February 14, 1983, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. This case was initiated in October 1969, when respondent Cowles Broadcasting, Inc. (Cowles)[1] filed an application for renewal of its initial three-year license to operate station WESH-TV (Channel 2) in Daytona Beach, Florida (Pet. App. A-282). On January 2, 1970, petitioner filed a competing application for a construction permit to build a new station to use Channel 2.

After a comparative hearing under 47 U.S.C. 309(e), the Federal Communications Commission decided on June 20, 1976, to renew Cowles' license (Pet. App. A-108 to A-248). On appeal, the Court of Appeals for the District of Columbia Circuit vacated the Commission's renewal order and remanded the case to the Commission for further proceedings (Pet. App. A-269 to A-308).

The Commission was instructed on remand to consider further four factors potentially weighing against renewal of Cowles' application: (1) Cowles' ownership of other communications media compared with petitioner's lack of outside media interests (Pet. App. A-299 to A-302); (2) Cowles' lack of integration of ownership with management compared with petitioner's proposal (the owners of a total of 10.5% of the

[1] At all times pertinent to this proceeding Cowles Broadcasting, Inc. was a wholly owned subsidiary of respondent Cowles Communications, Inc. The parent corporation is also affiliated with various media interests throughout the United States.

stock were to serve full time in the management) (*id.* at A-304 to A-306); (3) the fact that Cowles had moved its main studio from its city of license, Daytona Beach, to Orlando, without prior Commission approval and in violation of a Commission rule (*id.* at A-296 to A-297); and (4) the involvement of other subsidiaries of Cowles' parent corporation in a mail fraud scheme involving magazine subscriptions (the "paid during service" (PDS) operations) (*id.* at A-297 to A-299). The court also ordered the Commission to articulate more clearly how it weighed these various factors against Cowles' past broadcast record (Pet. App. A-4 to A-5).

2. On remand, the Commission adhered to its prior holding that Cowles' broadcast record had been substantial [2] and that this should outweigh petitioner's acknowledged advantages (Pet. App. A-38 to A-41) with respect to diversification of media ownership and integration of ownership and management. The Commission was particularly impressed by Cowles' numerous news, public affairs and local programs reflecting its "local community orientation" (*id.* at A-36). The Commission also noted Cowles' excellent reputation in the community (evidenced by the favorable testimony of seven community leaders and three public officials), and the conspicuous absence of any adverse testimony or complaints in the record (*id.* at A-35 to A-38).

In support of its conclusion that in the comparative renewal context an incumbent's meritorious record should outweigh a challenger's advantages under diversification and integration, the Commission cited three "significant public interest" reasons (*id.* at

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[2] "Substantial" and "meritorious" are herein used interchangeably.

A-44). First, if a meritorious incumbent were replaced, the station's audience would lose a proven performer in the public interest with no guarantee that the challenger's untested "paper proposals will, in fact, match the incumbent's proven performance" (*id.* at A-45). Second, a policy that gives substantial weight to a meritorious record serves as an incentive for incumbent licensees (many of whom are at a comparative disadvantage with respect to diversification and integration)[3] to make investments and take other steps to ensure that they render meritorious service (*ibid.*). Finally, failure to recognize properly a meritorious record would require a restructuring of the broadcast industry, thereby creating an instability that the Commission believed would not be in the public interest (*id.* at A-45, A-50 to A-51).

The Commission also considered the effect on the renewal application of Cowles' violation of the main studio rule and the involvement of its sister corporations in mail fraud. Because the studio rule was directly related to broadcast service, the Commission concluded that Cowles' violation required the assessment of a demerit (*id.* at A-34). The Commission found, however, that the violation was largely technical; Cowles did not close its Daytona Beach studio, but rather maintained a new, bigger studio in Orlando. Thus, there was no evidence that Cowles had attempted to "flout" the Commission's rule (*id.* at A-35). Moreover, Cowles was still rendering meritorious service to Daytona Beach and in fact had "materially improved" its Daytona Beach/Holly Hill studio (*id.* at A-34 to A-35, A-52).

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[3] More than two-thirds of commercial television stations are licensed to group owners (Pet. App. A-45, citing *Broadcasting Cable Yearbook* (1981) at A-2, A-36 to A-51).

With regard to the mail fraud issue, the Commission found that Cowles' broadcast facilities had not been used to facilitate mail fraud; nor had there been a commingling of operating personnel between the PDS subsidiaries and the broadcast licensee.[4] The Commission thus concluded that the non-broadcast misconduct of the PDS subsidiaries "[does] not portend Cowles' likely future performance as a broadcast licensee [and] [t]herefore, neither disqualification nor a comparative demerit is warranted" (*id.* at A-29 to A-30; footnote omitted).

3. The court of appeals affirmed (Pet. App. A-1 to A-15).[5] Noting the Commission's "painstaking and explicit" balancing of the relevant considerations, the court concluded that "the Commission has followed our directives and corrected, point by point, the * * * analysis of the four factors cutting against Cowles' requested renewal" (*id.* at A-5). Based on the Commission's factually supported findings that diversification of media ownership, integration of ownership and management and the studio move rule violation

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[4] There were some common officers of the licensee and the PDS subsidiaries, and in its earlier opinion the court of appeals was concerned that the Commission had not explored what, if any, significance this should have (Pet. App. A-297 to A-298). On remand the Commission found on the basis of extensive testimony in the original record, including that from the United States Attorney who investigated the entire PDS fraud, that there was "no basis" for concluding that these common officers had "participated in or encouraged" any mail fraud (*id.* at A-29).

[5] The same panel which had previously reversed and remanded the case heard this appeal.

favored petitioner and that past broadcast performance favored Cowles,[6] the court of appeals perceived its role as evaluating "the way in which the FCC weighed" those factors (*id.* at A-6). The court recognized that past meritorious service is the best predictor of future performance in the public interest. Accordingly, it concluded that the Commission committed no error in finding that Cowles' past meritorious service outweighed the three competing factors and that renewal of the license was warranted. The court added that if Congress desired the Commission to follow a stricter approach towards renewing the licenses of incumbents who are challenged by competing applicants, Congress would have to act, because the Commission's policy concerning a renewal expectancy, as enunciated here, "is within the statute" (*id.* at A-8).

## ARGUMENT

Petitioner claims (Pet. 24) that the Commission's decision in favor of Cowles creates "property rights and interest beyond those which the limited licensing scheme for broadcasting licenses * * * has created" and violates a competing applicant's right to a full hearing under *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945). Petitioner further argues (Pet. 10-11, 24) that the decision below violates the First

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[6] The court upheld the Commission's findings "that the mail fraud inquiry had not been curtailed in any significant way," and that there was no basis on the record under the mail fraud issue for disqualifying Cowles or for assessing a comparative demerit against it (*id.* at A-11 n.29; citations omitted).

Amendment by chilling opportunities for expression by those who seek to displace incumbent licensees.[7] These contentions are without merit.[8]

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[7] Petitioner inaccurately states that, "[s]ince 1974, no competing applicant has even so much as filed an application with the FCC to attempt to challenge a television licensee at renewal" (Pet. 4). In fact, since 1974, eleven competing television applications have been filed with the FCC for stations in eight states.

Petitioner also refers to a Commission policy against settlement of comparative renewal cases (Pet. 12 & n.16). In 1981, however, Congress added Section 311(d) to the Communications Act, which permits the Commission to approve an agreement whereby a competing applicant withdraws in exchange for reimbursement of its out-of-pocket expenses, if the Commission is satisfied that (1) the competing application was not filed "for the purpose of reaching or carrying out such agreement" and (2) the agreement is "consistent with the public interest." Pub. L. No. 97-35, Section 1243, 95 Stat. 737, to be codified at 47 U.S.C. 311(d). In light of the new statute, the Commission has overruled its former policy disfavoring settlements of comparative renewal cases and now examines such settlements in the same manner as withdrawal agreements in initial licensing cases. See *Western Connecticut Broadcasting Co.*, 88 F.C.C. 2d 1492, 1496-1497 (1981).

[8] Petitioner also asserts (Pet. 18) that when the Commission concluded that the PDS mail fraud warranted neither the disqualification of the licensee nor a comparative demerit, the Commission applied a "different character standard" from that followed in *RKO General, Inc.*, 78 F.C.C. 2d 1 (1980), aff'd in part, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982). The Commission, however, properly found that this case "differs significantly" from RKO's disqualification, because RKO's misconduct involved misrepresentations to the Commission by the licensee itself. There is no allegation in this case that Cowles itself engaged in any misconduct (Pet. App. A-30 n.47).

This Court has stated that although Section 301 of the Communications Act[9] precludes a licensee from acquiring "any legal or proprietary right to a renewal," the Commission can still "take into account the incumbent's past performance in deciding whether renewal would serve the public interest." *FCC* v. *National Citizens Committee for Broadcasting* (*NCCB*), 436 U.S. 775, 806 n.25 (1978). As the court of appeals pointed out, each of the "public interest" justifications asserted by the Commission (see pages 3-4, *supra*) for the substantial weight it gives to an incumbent licensee's meritorious broadcast record was cited by this Court in *FCC* v. *NCCB*, *supra* (Pet. App. at A-8 to A-9 n.19, citing 436 U.S. 805, 807 and 809).[10]

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[9] That Section provides, *inter alia*, that "no * * * license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. 301.

[10] Moreover, contrary to the argument of respondent National Black Media Coalition (Br. 5-6), the Commission in a comparative renewal proceeding may give a preference to an incumbent whose performance was substantial but not superior or exceptional. In *FCC* v. *NCCB*, this Court approvingly pointed out that "both the Commission and the courts have recognized that a licensee who has given meritorious service has a 'legitimate renewal expectanc[y]' that is 'implicit in the structure of the Act' and should not be destroyed absent good cause." 436 U.S. at 805, quoting *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 854 (1970), cert. denied, 403 U.S. 923 (1971). In the *Greater Boston Television* case, the court of appeals made clear its understanding that in a typical comparative renewal case, the incumbent would be entitled to a "predicate for renewal on the basis of a sound or 'favorable' record," which the court specifically distinguished from "an exceptional record." 444 F.2d at 854.

Petitioner argues (Pet. 16-17) that the advantage given to incumbents creates an insuperable barrier to a competing applicant and thus undermines the principle of a comparative hearing announced by this Court in *Ashbacker Radio Corp.* v. *FCC*, *supra*. But far from aiding petitioner, *Ashbacker* indirectly supports the result reached by the Commission in this case. In requiring that there be a comparative hearing at the initial licensing stage, the Court implicitly recognized that public interest considerations work against "displac[ing] an established broadcaster." 326 U.S. at 332. As the Court stated, "a newcomer" who files a competing application against an incumbent licensee is "under a greater burden than if its hearing had been earlier," *i.e.*, before either applicant has been licensed. *Ibid.*

Petitioner's First Amendment argument (Pet. 10) is equally unpersuasive. This Court has long held that denial of a license, based on the public interest standard in the Communications Act, is not a denial of free speech. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-227 (1943); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 389 (1969); *FCC* v. *NCCB*, *supra*, 436 U.S. at 800.[11]

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[11] There is no reason for this Court to reexamine the Commission's weighing of the mail fraud, studio move and media diversification issues (Pet. 17-21). "[T]he weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance," *FCC* v. *NCCB*, *supra*, 436 U.S. at 810, and "[t]he Commission's implementation of [that] standard, when based on a rational weighing of competing policies, is not to be set aside." *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). The court of appeals was completely satisfied that the Commission's judgment regarding the public interest was supported by the record and the decision in favor of Cowles was fully explained. Accordingly, there is no need for further review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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